U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 83-167

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

PAULA E. PFISTER,

Petitioner,

vs.

AMERICAN AIRLINES, INC., a Corporation;

BARBARA BAUER, Stewardess Supervisor/ Employee of AMERICAN AIRLINES, INC.;

IRVING CURHAN, Director of Flight Service/ Employee of AMERICAN AIRLINES, INC.;

AIRLINE STEWARDS AND STEWARDESSES ASSOCIATION, TRANSPORT WORKERS UNION LOCAL 550/552 AFL-CIO;

HONORABLE MANUEL REAL, JUDGE OF THE U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA;

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Pfister has set forth sufficiently compelling reasons to invoke discretionary review of this Court.

2. Whether Pfister's statute of limitations argument presents a "specific and important reason" for granting review by this Court.

3. Whether Pfister's claim of irregularities in the proceedings below is sufficient to invoke this Court's power of supervision.

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OPINIONS BELOW

The judgments of the United States Court of Appeals for the Ninth Circuit and the District Court for the Central District of California are unreported.

The opinion of the United States District Court for the Central District of California is reprinted in Appendix A.

The opinion of the United States Court of Appeals for the Ninth Circuit is reprinted in Appendix B.

STATEMENT OF JURISDICTION

Pfister seeks to invoke this Court's jurisdiction under 28 U.S.C. Section 1651, and Rules 17 and 26 of the Supreme Court Rules.

STATUTES INVOLVED

The following statutes and Supreme Court Rules are reprinted in Appendix C: 28 U.S. § 144; Rules 17, 26 and 49.2 of the Supreme Court Rules; and Sections 338(1) and 170.6(1) of the California Code of Civil Procedure.

STATEMENT OF THE CASE

Petitioner, Paula E. Pfister (hereinafter "Pfister"), is a former employee of Respondent American Airlines, Inc. (hereinafter "American") and a former member of Respondent Airline Stewards and Stewardesses Association, Transport Worker's Union of America, AFL-CIO, Local 550/552 (hereinafter "Union"). American is a carrier by air subject to the provisions of the Railway Labor Act, 45 U.S.C. §§ 151, et seq.

Pfister's action herein arises out of her discharge by American for misconduct in June of 1970.

Pfister filed her original Complaint on or about November 1, 1978. On November 28, 1978 American filed its Motion to Dismiss the Complaint for failure to adequately allege diversity jurisdiction.

On January 11, 1979, the District Court issued its order granting American's Motion to Dismiss and allowed Pfister thirty (30) days leave to amend.

On February 14, 1979, Pfister filed her First Amended Complaint. On March 9, 1979, American filed its Motion to Dismiss the First Amended Complaint for failure to adequately allege diversity jurisdiction.

On May 3, 1979, the District Court issued its order granting American's Motion to Dismiss the First Amended Complaint and allowed Pfister thirty (30) days to amend.

On June 12, 1979, Pfister filed her Second Amended Complaint. On June 29, 1979, American filed its Motion to Dismiss the Second Amended Complaint for failure to adequately allege federal-question jurisdiction. On July 11, 1979 Union filed its answer to the Second Amended Complaint.

On August 22, 1979, the District Court issued its order granting American's Motion to Dismiss the Second Amended Complaint. This order allowed Pfister sixty (60) days leave to amend her Complaint.

Instead of amending her Complaint, Pfister filed a Notice of Appeal on September 17, 1979.

On or about October 7, 1980, the U.S. Court of Appeals for the Ninth Circuit issued its order dismissing Pfister's appeal, sua sponte, for lack of jurisdiction. This Court's order was based on the ground that the appeal was not taken from a final order and informed Pfister that she should "move in the District Court for permission to file an Amended Complaint."

On March 3, 1981, Pfister filed her Third Amended Complaint without obtaining leave to amend from the District Court. On March 26,

1981, American and Union filed Motions to Dismiss the Third Amended Complaint for failure to adequately allege federal-question jurisdiction, failure to state a cause of action arising under federal law which would not be barred by the applicable statute of limitations, and failure to seek leave to amend.

On June 8, 1981, Pfister filed her Application for Disqualification of District Court Judge Manuel Real. On the same day, the District Court by Judge Malcolm M. Lucas, issued its order denying Pfister's Application.

On June 9, 1981, the District Court issued its order granting American's Motion to Dismiss the Third Amended Complaint without leave to amend on the grounds that Pfister's allegations failed to state a claim under federal law, Pfister's action was barred

by the applicable statute of limitations, Pfister's allegations failed to set forth any facts sufficient to toll the applicable statute of limitations and Pfister failed to apply for leave to amend.

On June 17, 1981, Pfister filed her Notice of Appeal.

On November 4, 1982, Pfister's appeal was argued before the U.S. Court of Appeals for the Ninth Circuit.

On January 5, 1983 the Ninth Circuit Court of Appeals issued its memorandum opinion affirming the District Court's ruling on the ground that Pfister's federal claim was barred by the applicable state statute of limitations set forth in California Code of Civil Procedure Section 338 and that Pfister had not alleged and had not shown that she could allege facts which would toll the statute of limitations.

On or about January 18, 1983 Pfister filed a Petition for Rehearing En Banc with the Ninth Circuit Court of Appeals.

On May 16, 1983 the Ninth Circuit Court of Appeals issued its order unanimously denying Pfister's Petition for Rehearing.

On August 2, 1983 Pfister filed her Petition for Writ of Certiorari herein.

SUMMARY OF ARGUMENT

Pfister has failed to demonstrate that her case merits review by this court. The arguments raised by Pfister are groundless and represent an attempt to relitigate issues already addressed and decided by the courts below.

ARGUMENT

I.
PFISTER'S PETITION FAILS TO SET FORTH SUFFICIENTLY COMPELLING REASONS FOR A REVIEW PURSUANT TO A WRIT OF CERTIORARI.

Pfister's petition raises three issues for consideration on review.

First, Pfister contends that the Ninth Circuit Court of Appeals failed to recognize the District Court's "sufficient primary jurisdiction" over her claim under the Railway Labor Act. Specifically, Pfister contends that the Ninth Circuit did not "accord deference" to this Court's holdings in Vaca v. Sipes, 386 U.S. 171 (1966); Glover v. St. Louis - S.F.R. Co., 393 U.S. 324 (1969); and Hines v. Motor Freight, Inc., 424 U.S. 554 (1976) (Petition, page 43-45).

Secondly, Pfister argues that the Court of Appeals improperly applied the applicable

statute of limitations in holding that her federal claim was barred. (Petition, page 54-60).

Thirdly, Pfister contends that the Court of Appeals committed error in not permitting her counsel of record, Eugene J. Carella, to appear before it, and in not preserving tape transcripts of the oral hearing on appeal. (Petition, page 60-64).

The issues raised by the foregoing arguments as presented in Pfister's petition do not satisfy the criteria generally followed by this Court in granting review on a Writ of Certiorari. According to Rule 17 of the Supreme Court Rules: "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17.

Some of the "special and important reasons" for granting review recognized by Rule 17 include conflicting decisions of the Federal Courts of Appeals on the same matter; a decision by the Court of Appeals on an important question of federal law which has not been, but should be, settled by this Court; or a decision by a Federal Court of Appeals on a federal question which is in conflict with applicable decisions of this Court. Sup. Ct. R. 17.

Certiorari is not an appropriate vehicle by which to review issues which are not in conflict and which have already been addressed and decided by the Court of Appeals. In Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 530-31 (1957), Justice Frankfurter, dissenting, took exception to the Court's all too frequent grant of certiorari in FELA

cases. In discussing the proper scope of certiorari, Justice Frankfurter stated in pertinent part:

> . . . [S]uch cases could be reviewed by the Supreme Court only on certiorari to 'secure uniformity of decision' between the Circuit Courts of Appeals and 'to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing . . . . These remarks, of course, apply also to applications for certiorari to review judgments and decrees of the highest courts of States.' (Citations omitted)

In Hamilton-Brown Shoe Company v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916), this Court stated that certiorari jurisdiction is: ". . . a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decisions."

Pfister must show that her case is of "importance to the operation of our federal system" and not "merely to the parties" involved. Rogers, 352 U.S. at 540; see also Carter v. Atlanta & St. A.B.R. Co., 338 U.S. 430 (1949).

Nowhere in Pfister's petition does she demonstrate how her claim falls within the parameters discussed by the above-cited authorities. She has not presented a single issue which is the subject of conflicting decisions of the Court of Appeals, or which presents a conflict between decisions by the Court of Appeals and a decision by this Court.[1]

1. In this regard, it should be noted that Pfister's arguments concerning the application of original federal question jurisdiction under the Railway Labor Act have no bearing on the Ninth Circuit's decision in this case. Although the issue was argued before the Ninth Circuit, it was not the basis of the Ninth Circuit's opinion.

Respondents submit that Pfister is improperly asking this Court to relitigate factual determinations made by the courts below. The mere dissatisfaction of a party is not sufficient to invoke Supreme Court review. As stated in Supreme Court Practice,

> Lawyers, of course, are likely to regard any case they have lost in a lower court as necessarily in conflict with some Supreme Court decision or doctrine; that is what makes the ruling below 'erroneous.' But such a loose reading of the Rule [17] concept of a decision 'in conflict with applicable decisions of this court' does not satisfy the Supreme Court's understanding of what constitutes a conflict, and will not be sufficient to obtain a grant of certiorari. A true conflict, in other words, must be direct and irreconcilable, and must be demonstrably so.

R. Stern & E. Gressman, Supreme Court Practice, at 273 (1978).

II.
PFISTER'S ARGUMENT CONCERNING THE STATUTE OF LIMITATIONS DOES NOT PRESENT A "SPECIAL AND IMPORTANT REASON" FOR GRANTING REVIEW ON A WRIT OF CERTIORARI.

Pfister argues that the Ninth Circuit committed error in holding that Pfister's claim under the Railway Labor Act was barred by the statute of limitations set forth in California Code of Civil Procedure Section 338. Specifically, Pfister argues for the first time that New York's six year limitation period for an action based upon a contractual obligation should have been applied. This novel argument was not raised in the proceedings in the Ninth Circuit. Pfister conceded then, and the Ninth Circuit agreed, that the appropriate statute of limitations is California's Section 338.

The authority cited by Pfister in support of her resort to the New York contract statute, Abrams v. Carrier Corporation, 434 F.2d

1234 (2d Cir. 1970), is distinguishable simply because it was a case arising in and litigated in New York. Pfister cannot demonstrate that the holding in Abrams conflicts with the Ninth Circuit's holding in Price v. Southern Pacific Transportation Company, 586 F.2d 750, (9th Cir. 1978), followed in this case, because both decisions simply applied the settled rule that the federal courts must look to the analogous statute of limitations under state law to determine the limitations period applicable to the federal cause of action.

Pfister's reliance on this Court's holding in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981), is also misplaced. In that case, this Court granted certiorari to resolve a direct conflict between the second and third circuits concerning the application of identical statutes of limitation. Id. footnote 1 at 60. There is no similar conflict presented in this case.

Pfister's assertion that the Ninth Circuit committed error by not making a determination as to which statute of limitations applied is totally groundless since that court's memorandum opinion states quite clearly that the applicable period of limitations is set forth in Code of Civil Procedure Section 338. (Appendix B)

III.

PFISTER'S CLAIMS OF "GROSS IRREGULARITIES" COMMITTED BY THE DISTRICT COURT AND COURT OF APPEALS ARE COMPLETELY UNFOUNDED, AND DO NOT WARRANT THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Pfister contends that the District Court's order denying her application to disqualify the Honorable Manual Real constituted error. This issue was addressed in Pfister's appeal to the Ninth Circuit and rejected on the ground that she had failed to set forth any indication of extrajudicial bias or prejudice as required by 28 U.S.C. Section 144. Pfister's insistence that she

may preemptorily disqualify a federal district judge by invoking California Code of Civil Procedure Section 170.6 is without basis in reason.

Pfister next argues that the Ninth Circuit erred in refusing to permit Eugene J. Carella to represent her at the oral argument on appeal.

Pfister's petition fails to disclose the circumstances under which her counsel's admission to the bar of the Ninth Circuit Court of Appeals was revoked. The most that is said about the subject is contained at page 33-34 of Pfister's petition: ". . . the U.S. Court of Appeals Circuit Judges Norris and Wright willfully, and in furtherance of a conspiracy, prevented petitioner's undersigned counsel from representing her before the U.S. Court of Appeals for the Ninth Circuit despite his outstanding reputation

as a federal practitioner and appellate advocate." Pfister's unsupported and outrageous allegation of a conspiracy between the judges of the Ninth Circuit falls far short of establishing a cause for review. A federal court must have the power and discretion to establish and enforce the qualifications and standards of conduct of the attorneys admitted to practice before it.

Lastly, Pfister asserts that she was denied the right to a short continuance to secure substitute counsel to represent her at the oral argument. (Petition, page 64). Although Pfister declines to state when the need for new counsel first became apparent, a review of Appendix K to her petition indicates that she was representing herself in propria persona as early as September 25, 1982, over a month before the hearing date of November 4, 1982, and a month before she filed her emergency Motion for Continuance (Appendix I to

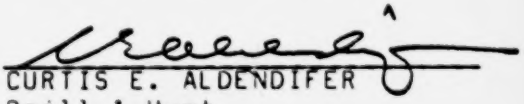
the petition) on October 25, 1982. Pfister had more than enough time to obtain substitute counsel, if that was her desire. There was nothing irregular or unusual in the Ninth Circuit's order denying her emergency Motion for Continuance.

CONCLUSION

Respondents submit that Pfister's petition fails to raise any issues which are appropriate for review on certiorari. In fact, the claims raised by Pfister are frivolous as that term is defined by Justice Frankfurter in Rogers, 352 U.S. at 537: "'Frivolous' meaning that the issues are not deserving of consideration for review . . .".

Respondents therefore submit that Pfister's petition for Writ of Certiorari should be denied as frivolous. Respondents further request that the Court award appropriate damages to respondents in accordance with Rule 49.2 of the Supreme Court Rules.

Respectfully submitted,



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August 26, 1983

APPENDIX A

Attorneys for Defendant,
AMERICAN AIRLINES, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAULA E. PFISTER,	)	CIVIL ACTION NO.
	)	78 4216 R(Gx)
Plaintiff,	)	
	)	ORDER OF DISMISSAL
vs.	)	
	)	
AMERICAN AIRLINES, INC. a Corporation, et al.,	)	
	)	
Defendants.	)	
	)	

The Motions of defendants, AMERICAN AIRLINES, INC. and AIRLINE STEWARD AND STEWARDESSES ASSOCIATION, TRANSPORTATION WORKER'S UNION LOCAL 550/552, ALF-CIO, for an Order Dismissing plaintiff, PAUL E. PFISTER's Third Amended Complaint were heard on June 8, 1981, by the Honorable Manuel L. Real, District Judge presiding.

The Court, having considered the moving and opposition papers, as well as oral argument, grants defendants' Motions on the following grounds:

1. Plaintiff has failed to apply for leave to file her Third Amended Complaint.

2. Plaintiff's action is barred by the applicable Statute of Limitations.

3. Plaintiff's allegations fail to set forth any facts sufficient to toll the applicable Statute of Limitations.

4. Plaintiff's allegations fail to state a claim under Federal law. (handwritten in).

IT IS THEREFORE ORDERED that plaintiff's Third Amended Complaint be dismissed without leave to amend.

DATED: June 9, 1981

(Name stamped in)
MANUEL L. REAL
UNITED STATES
DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAULA E. PFISTER, Plaintiff-Appellant, vs. AMERICAN AIRLINES, INC. a Corporation; BARBARA BAUER, Stewardess Supervisor/Employee of AMERICAN AIRLINES, INC.; IRVING CURHAN, Director of Flight Service/ Employee of AMERICAN AIRLINES, INC.; AIR LINE STEWARDS and STEWARDESSES ASSOCIATION, TRANSPORT WORKERS UNION LOCAL 550/552, AFL-CIO, Defendants-Appellees.	No. 81-5550 D.C. No. 78-4216-R MEMORANDUM

Appeal from the United States District Court
For the Central District of California
The Honorable Manuel L. Real, Presiding
Argued and Submitted November 4, 1982

Before: GOODWIN, HUG, and BOOCHEVER, Circuit Judges.

Pfister appeals the district court's dismissal of her third amended complaint without leave to amend. She asserts that (1) Judge Lucas abused his discretion by failing to grant her motion to have Judge Real removed from the case; and (2) Judge Real subsequently

erred in dismissing her third amended complaint, which she alleges was both substantively sufficient and appropriately filed. We affirm.

Pfister argues first that Judge Real's dismissal of her third amended complaint has no legal effect because Judge Lucas erred in failing to grant her motion to have Judge Real replaced. To successfully challenge a judge for bias, a party must file a legally sufficient affidavit indicating that "the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party." 28 U.S.C. § 144. The affidavit is not legally sufficient "unless it specifically alleges facts that fairly support the contention that the judge exhibits bias or prejudice directed toward a party that stems from an extrajudicial source." United States v. Sibla, 624 F.2d 864, 868 (9th Cir. 1980). Pfister's affidavit contends only that Judge Real "sua sponte ordered a status conference and hearing on Defendant's motions to dismiss for June 8, 1981, with only a few days' notice." This allegation affords no indication of extrajudicial bias or prejudice, and we therefore uphold Judge Lucas' denial of Pfister's section 144 motion.

Pfister next contends that Judge Real erred in dismissing her third amended complaint. The major justification for the dismissal of Pfister's third amended complaint was that it failed to allege federal question jurisdiction and a claim for relief arising under federal law which would not be barred by the applicable statute of limitation.

We agree that this action was not timely filed. Wrongful discharge claims brought under the Railway Labor Act constitute federal actions, but their timeliness is governed by the appropriate state statute of limitations. Price v. Southern Pacific Transp. Co., 586 F.2d 750, 752 (9th Cir. 1978). As Pfister concedes, Cal. Civ. Proc. Code § 338, which creates a three-year statute of limitations, is applicable here. See Id. at 753 (§ 338 applied in similar case in which plaintiff resided and was employed in California, and all pertinent events took place there). Pfister did not file her claim until nearly eight years after her discharge and six years after the union's action is settling the grievance.

Pfister argues that the statute was tolled by the appellees' fraudulent concealment of material facts. Under California law, the existence of such fraudulent concealment, if properly established, caused the applicable statute of limitations to be tolled. Baker v. Beech Aircraft Corp., 39 Cal.App.3d 315, 321 (1974). However, "[t]he existence of such fraud must be alleged clearly and unequivocally, and must not rest upon inferences." Id.

The allegations of Pfister's complaint would indicate that Pfister may have had a claim for relief in 1972, but they do not indicate that this possible claim was fraudulently concealed from her so as to toll the applicable statute of limitations. This was the third attempt to amend the complaint to state a claim under federal law. There is no indication that there are facts justifying a fourth amendment. It was not an abuse of discretion to dismiss the complaint without further leave to amend.

AFFIRMED.

APPENDIX C

28 U.S.C. § 144 - Bias or Prejudice of Judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

SUPREME COURT RULES

Rule 17. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on

the same matter; or has decided a federal question in a way in conflict with a state court of last resport; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort of of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question, in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

Rule 26. Considerations governing issuance of extraordinary writs

The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequaate relief cannot be had in any other form or from any other court.

Rule 49.2. Interest and Damages

.2. When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

California Code of Civil Procedure § 338(1)

Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture.

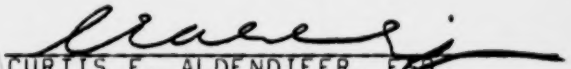
California Code of Civil Procedure § 170.6(1)

(1) No judge, court commissioner, or referee of any superior, municipal or justice court of the State of California shall try any civil or criminal action or special proceeding of any kind or character nor hear any matter therein which involves a contested issue of

law or fact when it shall be established as hereinafter provided that such judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in such action or proceeding.

CERTIFICATE OF COUNSEL

I, Curtis E. Aldendifer, Esq., counsel for Respondents and a member in good standing of this court, do hereby certify that the within Brief in Opposition to the Petition for Writ of Certiorari and/or Petition for Writs of Mandamus, Prohibitation or the Like directed to the U.S. District Court for the Central District of California and U.S. Court of Appeals for the Ninth Circuit designated herein is presented in good faith to fully ensure and protect the cause and rights of Respondents, and is not filed for purpose of delay.



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CERTIFICATE OF SERVICE AND FILING

I, Curtis E. Aldendifer, Esq., do hereby certify that on this 26th day of August 1983, I duly served true copies of the within document, entitled JOINT BRIEF OF RESPONDENTS IN OPPOSITION, on all parties of record and all respondents named herein, by placing three (3) true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, addressed as follows:

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Judges, U.S. Court
of Appeals for the
Ninth Circuit
7th & Mission Street
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Further, on August 26, 1983 I served the foregoing document upon the Clerk of the United States Supreme Court, by mailing forty (40) true copies thereof to said court, addressed as follows:

Clerk of the United States Supreme Court
Washington, DC 20543

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 26, 1983 at Los Angeles, California.

CURTIS E. ALDENDIFER